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Loss of Consortium to Wife Caused by Negligence of Third Party

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not forget the closeness of the *Olmstead*[36] decision where the Court ruled that wiretapping fell outside the protection of the fourth amendment. But is not wiretapping as great an intrusion on the right of privacy as an unconstitutional search and seizure? Would the Court's decision be the same as in *Olmstead* if it were to reappraise the issue? One might anticipate that the Court will provide the answer to these questions in the very near future.

The victory of *Pugach* may be short-lived. Law enforcement officials may once again be compelled to fight twentieth century crime with nineteenth century methods.[37] Undoubtedly the battle over wiretapping is just beginning. Many advocates urge as a solution to the problem what may be considered a middle-of-the-road position. While urging on the one hand that the Supreme Court take the initiative in enforcing the federal statute by ruling inadmissible such evidence unlawfully obtained by state officials and violative of the due process clause of the fourteenth amendment, they also seek legislation by Congress which would permit restricted and controlled wiretapping by authorized officials in a limited number of situations such as espionage, narcotics and kidnappings. Warrants should be required, and such warrants should be issued only by a federal judge or a designated member of the Federal Communications Commission. Such a statute would enable law enforcement officials to use wiretapping, while at the same time providing adequate safeguards to insure the protection of constitutional and statutory rights.[38]

K. Sidney Neuman

LOSS OF CONSORTIUM TO WIFE CAUSED BY NEGLIGENCE OF THIRD PARTY —Plaintiff's husband, a fireman, was severely injured while attempting to extinguish a fire caused by the defendant's negligence. Plaintiff brought suit for loss of consortium. From a summary judgment dismissing her action, the plaintiff appealed. *Held:* Reversed. Where a wife's conjugal interest is invaded by the negligent act of a third party,

[36] Olmstead v. United States, 277 U.S. 438 (1928). The historic dissents by Justices Holmes and Brandeis may well serve as a basis for overruling *Olmstead* in a future decision. Justice Douglas, in particular, has continued to strive to bring wiretapping within the protection of the fourth amendment. He states that this would be an effective solution to the wiretapping problem only if *Wolf v. Colorado* were reversed. Douglas, The Right of the People 150 (1952).

[37] See Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View*, 44 Minn. L. Rev. 835 (1960); Rogers, *The Case for Wiretapping*, 63 Yale L.J. 792 (1953).

[38] See 100 Cong. Rec. 4156 (1954), where Senator McCarren discusses a bill he introduced in the 83rd Congress. While the bill proposed a system similar to that of New York, it did not restrict grants of warrants by federal officers and was defeated.

she has the right to recover damages for her loss of consortium. *Dini v. Naiditch,* 170 N.E.2d 881 (Ill. 1961).

By permitting the wife to sue for loss of consortium, the Supreme Court of Illinois broke away from a long line of precedent in the United States denying a wife this cause of action,[1] and chose to follow the federal decision of *Hitaffer v. Argonne Co.*[2]

The last time the Kentucky Court of Appeals was confronted with this issue was in *La Eace v. Cincinnati, N. & C. Ry.*,[3] when it decided not to follow the *Hitaffer* case. The court, instead, elected to follow the rule in existence in Kentucky and other jurisdictions, holding in no uncertain terms that a wife could not sue for loss of consortium caused by the negligent act of a third party.[4]

The purpose of this comment is to evaluate the right of a wife to sue for loss of consortium in light of the recent *Dini* case and other decisions which have accepted the modern approach of the *Hitaffer* case. A review of these cases will indicate that when the Kentucky court is again faced with the question it would be justified in overruling the *La Eace* case.

There are several arguments used for denying this cause of action to a wife in a negligence case which have been considered by recent decisions. The first is the contention that a wife's interest is too remote from the injury to her husband to warrant protection. This contention has been rejected by several recent cases[5] for the simple reason that the same injury to the husband's interest has never been regarded as too remote when he brings such an action. It is wholly inconsistent to say that such injuries to a wife are remote and at the same time maintain that such injuries to a husband are not too remote for a cause of action to exist.[6] Surely the right of consortium with a spouse is as valuable to a wife as it is to a husband.

A second reason given for denying the wife's recovery is based on a fear of double recovery for the same injury. This argument assumes that if the husband recovers in his own action for injuries received to

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[1] A large number of cases are cited in the principal case at 170 N.E.2d 881, 889.

[2] 183 F.2d 811 (D.C. Cir. 1950).

[3] 249 S.W.2d 534 (Ky. 1952).

[4] For a discussion of the problem in Kentucky prior to 1950, see 35 Ky. L.J. 220 (1947). When this comment was written in 1947, only one case could be cited allowing the wife to recover in negligent actions, Hipp v. E. I. DuPont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921), and it was overruled by Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

[5] Cooney v. Moomaw, 109 F. Supp. 448, 450 (D. Neb. 1953); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480, 485 (1956); Montgomery v. Stephans, 359 Mich. 33, 101 N.W.2d 227, 231 (1960); Hoekstra v. Helgeland, 98 N.W.2d 669, 679 (S.D. 1959).

[6] Dini v. Naiditch, 170 N.E.2d 881, 891 (Ill. 1961).

compensate for his diminished ability to support his family, then the wife should not be able to recover anything. This argument has also been rejected by recent decisions[7] on the ground that the wife's right to consortium involves a great deal more than mere support. The court in the principal case pointed out that any conceivable double recovery could be prevented by merely "deducting from the computation of damages in the consortium action any compensation given her husband in his action for the impairment of his ability to support."[8]

A third important argument for denying the recovery is based on the contention that any remedy the wife may acquire can only come from the legislature. This argument was made in *Hoekstra v. Helgeland*[9] but the court refused to give it any weight by stating:

> We believe we would be denying a present-day common-law right of action if we held that a wife cannot recover for loss of consortium due to the husband's negligent injury. *Thus the only matter for the legislature would be the denial of the wife's right of action and not the allowance thereof.*[10] (Emphasis added.)

This feeling that the wife's right to bring the action does not rest in the legislature is shared by the court in the *Dini* case where it is stated that since "the obstacles to the wife's action were 'judge invented,' there is no conceivable reason why they cannot be 'judge destroyed.'"[11]

Other arguments could be discussed, especially those based on common-law dogma,[12] but the three dealt with above are the most difficult hurdles for a wife to cross in bringing this action.

No matter how well the arguments are rebutted, however, the fact still remains that a court can deny the action on precedent alone if it is so disposed. Disregarding precedent has been a major task for every court which has accepted the *Hitaffer* case and granted recovery. Statements by various courts in making this determination are not only inspiring but are also paving the way for other courts to follow. In *Montgomery v. Stephan*,[13] for example, the court recognized the vast number of cases denying the wife's recovery but nevertheless stated:

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[7] Hitaffer v. Argonne Co., 183 F.2d 811, 819 (D.C. Cir. 1950); Cooney v. Moomaw, 109 F. Supp. 448, 450-51 (D. Neb. 1953); Bailey v. Wilson, 100 Ga. App. 405, 111 S.E.2d 106, 108-09 (1959); Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480, 485 (1956); Hoekstra v. Helgeland, 98 N.W.2d 669, 679 (S.D. 1959).

[8] Dini v. Naiditch, 170 N.E.2d 881, 891 (Ill. 1961).

[9] 98 N.W.2d 669 (S.D. 1959).

[10] *Id.* at 683.

[11] Dini v. Naiditch, 170 N.E.2d 881, 892 (Ill. 1961).

[12] The reasons given for denying a wife the right to sue in her own behalf are discussed in 35 Ky. L.J. 220 (1947).

[13] 359 Mich. 33, 101 N.W.2d 227 (1960).

> Were we to rule upon precedent alone, were stability the only reason for our being, we would have no trouble with this case. We would simply tell the woman to begone, and to take her shattered husband with her, that we need no longer be affronted by a sight so repulsive. In so doing we would have vast support from the dusty books. But dust [*sic*] the decision would remain in our mouths through the years ahead, a reproach to law and conscience alike. Our oath is to do justice, not to perpetuate error.[14]

A similar feeling was expresed in *Brown v. Georgia-Tennessee Coaches*[15] where the court stated: "[W]e do indeed have a 'charge to keep,' but that charge is not to perpetuate error or to allow our reasoning or conscience to decay or to turn deft ears to new light and new life."[16]

In *Acuff v. Schmit*,[17] the court pointed out that loss of consortium is the gravamen of an action for alienation of affection; an action which is certainly available to a wife. On holding that a wife could also bring an action for loss of consortium due to a negligent injury to her husband the court stated:

> While we recognize the almost total lack of precedent for allowing appellant's cause of action, we deem precedent to be worthy of support only when it can stand the scrutiny of logic and sound reasoning in the light of present day standards and ideals. . . . [T]he reasoning and logic advanced by the great weight of authority denying relief is not [sound].[18]

The statements[19] made by these highly competent courts are clear recognition that the law on any particular subject should not become stagnant. At present many women have achieved higher attainments than men; they are no longer subservient and unable to go into court alone. Therefore, it is only reasonable that a wife should have the same right as her husband to sue for loss of consortium due to negligence.

The Kentucky Court of Appeals should be less hesitant to disregard precedent now than it was in 1952 in view of its decision in *Brown v. Gosser*[20] in 1953. There, the court broke with the past and allowed a woman to sue her spouse for a personal injury caused by her husband's negligence.[21] In so holding, the court pointed out that precedent "is

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[14] *Id.* at ——, 101 N.W.2d at 229.

[15] 88 Ga. App. 519, 77 S.E.2d 24 (1953).

[16] *Id.* at ——, 77 S.E.2d at 32. The *Brown* case has been followed by Georgia in Bailey v. Wilson, 100 Ga. App. 405, 111 S.E.2d 106 (1959), and Gordy v. Powell, 95 Ga. App. 822, 99 S.E.2d 313 (1957).

[17] 248 Iowa 272, 78 N.W.2d 480 (1956).

[18] *Id.* at ——, 78 N.W.2d at 485.

[19] See also Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950); Missouri Pacific Transp. Co. v. Miller, 227 Ark. 351, 299 S.W.2d 41 (1957).

[20] 262 S.W.2d 480 (Ky. 1953), noted in 42 Ky. L.J. 497 (1954).

[21] The same holding is found in Combs v. Combs, 262 S.W.2d 821 (Ky. 1953).

not a universal, inexorable command."[22] Since a wife can now sue her husband for a negligent injury, there is strong reason for maintaining that she can sue a third party for depriving her of her personal right to consortium with her husband. If she can sue in one instance, she should be able to sue in the other. A wife's action for loss of consortium is not an attempt to recover damages which only the husband is entitled to recover.[23] It is no different from an action for loss of consortium caused by an intentional tort, such as alienation of affection, which the Kentucky court readily recognizes.[24]

In conclusion, it is submitted that the *Dini* case is another step in establishing a new rule of law which has been long overdue. A wife's right to the consortium of her spouse is a personal right entitled to the protection of the law. The Kentucky Court of Appeals has expressed a modern attitude by allowing a wife to sue for a negligent injury inflicted by her husband and it is therefore only proper that a right of action should also be recognized where her injury is caused by the negligent act of a third party.

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[22] Brown v. Gosser, 262 S.W.2d 480, 484 (Ky. 1953).
[23] Bailey v. Wilson, 100 Ga. App. 405, 111 S.E.2d 106 (1959).
[24] Cravens v. Louisville & N.R.R., 195 Ky. 257, 242 S.W. 628 (1922).